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No. 02-29

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

FREDY ORLANDO VENTURA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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v.

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The petitions in this case and *INS* v. *Chen*, No. 02-25 (filed July 3, 2002), show that, in these cases and a large number of other cases involving claims for asylum and withholding of removal, the Ninth Circuit has overstepped the limits of its authority when reviewing decisions of the Board of Immigration Appeals (BIA). The petitions explain that when a court of appeals rejects the BIA's particular ground for finding that an asylum applicant failed to establish past persecution based upon a protected characteristic, the court should remand to the BIA for further proceedings, rather than itself adjudicating the applicant's eligibility for relief. The Ninth Circuit's repeated disregard for that rule puts it in conflict with decisions of this Court and of other courts of appeals. See Pet. 10-13; *Chen* Pet. 20-27. For these reasons, and in light of the substantial number of asylum cases that

arise in the Ninth Circuit (see *Chen* Pet. 29; *Chen* Reply Br. 10), certiorari is warranted.

1. a. Respondent asserts that reviewing courts have broad discretion to decide in the first instance issues that the BIA reasonably determined not to address. Br. in Opp. 7-11. According to respondent, the courts of appeals should "balance the benefits of deference [to the BIA] against the costs of deference," and should remand to the BIA only if they perceive that the "benefits" of further administrative proceedings outweigh the "costs" of such proceedings in the particular case. *Id.* at 8, 10-11, 13, 14. Thus, respondent says (*id.* at 6) that the Ninth Circuit is correct in deciding for itself whether it "is really worth it" to respect Congress's assignment of asylum and removal issues to the Attorney General and his delegates at the BIA, as well as Congress's assignment to the courts of only limited judicial review.

Respondent is mistaken. As this Court has held, the role of the courts in cases involving judicial review of agency action "is limited to considering whether the announced grounds for the agency decision comport with the applicable legal principles." *Port of Portland* v. *United States*, 408 U.S. 811, 842 (1972) (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943)). "[T]he guiding principle" in cases such as this "is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration." *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

Respondent points (Br. in Opp. 7-8) to this Court's acknowledgment that there may be isolated situations that warrant judicial resolution of an issue within an agency's jurisdiction. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985); *Idaho Power Co.*, 344 U.S. at 20. But that exception applies only in "rare circumstances," *Lorion*, 470 U.S. at 744, such as when the agency has manifestly demonstrated an unwillingness or inability to fulfill its

congressionally assigned responsibilities, and there is no other remedy available to the reviewing court. See, *e.g.*, *Bridge* v. *United States Parole Comm'n*, 981 F.2d 97, 106 (3d Cir. 1992) (remand required when district court overturns parole decision unless Parole Commission has demonstrated "repeated resistance to following court orders" in the case).[1]

Only "extraordinary circumstances" can justify judicial usurpation of an administrative agency's decision-making role. *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 792 (1978) (quoting *Idaho Power Co.*, 344 U.S. at 20). Yet in a fast-growing line of asylum decisions, the Ninth Circuit has routinely decided contested issues that are assigned by statute and regulation to the BIA but have not yet been addressed by the BIA in the particular case. See *Chen* Pet. 22-24 (discussing recent Ninth Circuit decisions); see also, *e.g.*, *Popp* v. *INS*, 41 Fed. Appx. 146 (July 12, 2002) (unpublished decision); *Santos-Diaz* v. *INS*, 41 Fed. Appx. 95 (July 9, 2002) (unpublished decision); *Cardenas* v. *INS*, 294 F.3d 1062 (9th Cir. June 12, 2002); *Silva-Jacinto* v. *INS*, 37 Fed. Appx. 302 (9th Cir. June 11, 2002) (unpublished decision), petition for cert. pending, No. 02-377 (filed Sept. 9, 2002); *Singh* v. *INS*, 35 Fed. Appx. 582 (May 22, 2002) (unpublished decision); *Rios* v. *Ashcroft*, 287 F.3d 895 (9th

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[1] Even an extraordinary need for speedy resolution of a substantive issue generally does not justify its disposition by the reviewing court, particularly because other remedial options that do not intrude as greatly upon the agency's assigned functions may be available. See, *e.g.*, *National Treasury Employees Union* v. *Horner*, 854 F.2d 490, 499-501 (D.C. Cir. 1988) (requiring district court to set schedule for agency action). In the immigration context, moreover, the alien cannot be removed unless and until a final order of removal has been entered by the BIA following the remand. An asylum applicant is thereby protected for the duration of the administrative proceeding from the persecution he alleges. As a result, an asylum case would rarely present an extraordinary need for speedy resolution from the alien's perspective.

Cir. May 1, 2002); *Salazar-Paucar* v. *INS*, 281 F.3d 1069 (9th Cir. Feb. 28, 2002), opinion amended, 290 F.3d 964 (9th Cir. May 9, 2002). The Ninth Circuit has done so, moreover, based upon nothing more than its own assessment of the evidence that the record then contained. In this case, for example, the court of appeals "conclude[d] that remand * * * is inappropriate because the INS's evidence of changed country conditions clearly demonstrates that the presumption of a well-founded fear of future persecution was not rebutted." Pet. App. 11a. Thus, the only feature of this case that the court of appeals identified as purported justification for denying the BIA the opportunity to address an unresolved question within the BIA's authority was that the court was confident of its *own* ability to determine the correct result. Cf. *Chen* Pet. App. 11a.[2]

The petition in *Chen* explains (at 24) why the Ninth Circuit's approach is inconsistent with separation of powers principles and fundamental principles of administrative law. Congress has expressly entrusted decision-making over immigration matters in general and over asylum matters in particular to the Attorney General and his delegates. 8 U.S.C. 1103, 1158; *Chen* Pet. 21-22, 25. At the most basic level, a court of appeals, in reviewing the record to make a de novo finding on a factual issue in the first instance, might overlook or fail to appreciate the signifance of evidence in the record that cuts against its conclusion. In this very case, for example, the court failed to recognize that the 1997 State Department report on which it relied when concluding that

[2] Respondent notes (Br. in Opp. 2, 11-12) that the Ninth Circuit has remanded some asylum cases after reversing the BIA's decision. But respondent agrees that the court of appeals has adopted the rule challenged in the petition—that the court will not remand to the BIA when the court (based on its own review of the administrative record in the first instance, without the benefit of the BIA's expert review) deems it "sufficiently clear" that "only one resolution of the issue is possible." *Id.* at 12-13.

the INS had not rebutted the presumption of future persecution, stated that (even at that time) only political party leaders or high-profile activists would be vulnerable to harassment, and then only in their home communities, making relocation within Guatemala viable. Pet. 12-13.

Furthermore, an unresolved question in an asylum case may often implicate significant policy considerations within the Attorney General's assigned field of authority, such that "a judicial judgment cannot be made to do service for an administrative judgment." *Chenery*, 318 U.S. at 88; see *ibid.* ("[A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."). Likewise, a court of appeals—which lacks specialized expertise in the immigration area—might be insensitive to broader factual or legal considerations of which the Attorney General (or the BIA on his behalf) would be aware. See *Chen* Pet. 24.

Finally, the Ninth Circuit's approach assumes that, if a case were remanded, the BIA would render its decision on the administrative record that was originally assembled by the immigration judge and BIA and that is before the court on judicial review. But that often would not be true—especially in an asylum or withholding-of-removal case, in which up-to-date information concerning conditions in the alien's home country becomes highly relevant if (as the Ninth Circuit concluded in this case) the alien has established past persecution in that country.[3] See *Chen* Pet. 24, 25-26. As the petition in *Chen* also notes (*id.* at 28), such considerations in support of a remand have particular force

[3] In this case, for example, the Ninth Circuit resolved the question of whether respondent would face a well-founded fear or threat of persecution in the future if he was returned to Guatemala, based on the State Department report concerning conditions in that country in 1997, more than five years ago. See Pet. 12-13; Pet. App. 11a-12a.

in asylum proceedings because those proceedings implicate foreign affairs, national defense, and immigration and naturalization policy.

b. Respondent confuses cases such as this—where a court's review of *an agency's original decision* gives rise to a new issue that the agency had not considered—with "primary jurisdiction" cases in which courts suspend their *own* original proceedings and refer a subsidiary question to an administrative agency that possesses special competence. Br. in Opp. 7-11; see, *e.g.*, *Reiter* v. *Cooper*, 507 U.S. 258, 268-269 (1993); *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956). The two situations, however, are fundamentally different. Primary jurisdiction doctrine "applies where the administrative agency cannot provide a means of complete redress to the complaining party and yet the dispute involves issues that are clearly better resolved in the first instance by the administrative agency." 2 Am. Jur. 2d *Administrative Law* § 513, at 501 (1994). Because it is always true in primary jurisdiction cases that Congress has not entrusted the relevant subject matter exclusively to an agency (see *Reiter*, 507 U.S. at 268), courts have considerable latitude when deciding whether to make an administrative referral. "In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *Western Pac. R.R.*, 352 U.S. at 64.

By contrast, in cases involving judicial review of agency action, the rule requiring a remand after the reviewing court has ascertained a legal error by the agency is mandated by Congress's assignment of decision-making responsibility to the agency. "[A]n administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC* v. *Pottsville Broad. Co.*, 309

U.S. 134, 145 (1940). Therefore, when the reviewing court decides the correct final result, the court "usurp[s]" a congressionally delegated administrative function. *Idaho Power Co.*, 344 U.S. at 20.

2. Respondent contends that the Ninth Circuit's approach does not create a circuit split. Br. in Opp. 11-13. He is again mistaken. The Seventh Circuit, for example, "will not weigh evidence that the [BIA] has not previously considered," because "an appellate court is not the appropriate forum to engage in fact-finding in the first instance." *Rhoa-Zamora* v. *INS*, 971 F.2d 26, 34 (1992), cert. denied, 507 U.S. 1050 and 508 U.S. 906 (1993). Likewise, the First Circuit recognizes that remanding to the BIA "is the appropriate remedy when * * * [the BIA] has failed to offer legally sufficient reasons for its decision." *Gailius* v. *INS*, 147 F.3d 34, 47 (1st Cir. 1998). Decisions of the Second, Third, and Fourth Circuits are in accord. See Pet. 11-12; see also *Gao* v. *Ashcroft*, 299 F.3d 266, 279 (3d Cir. 2002) (holding —after reversing adverse credibility determination—that "this case must be remanded," and noting that court "will leave [the assessment of other evidence] to the fact-finder").

The appellate decisions that respondent says are consistent with the Ninth Circuit's approach (Br. in Opp. 9-10) are inapposite. None involved an asylum decision by the BIA, or any other immigration issue. Indeed, most addressed only the distinct primary-jurisdiction question of whether to make a referral of an issue that arises in an original judicial action. See cases cited at *id.* at 9. The two appellate cases that do involve judicial review of agency action are likewise beside the point. In one, the Eighth Circuit declined to remand a case back to the *district court* after the court of appeals concluded that the existing record was sufficient to *uphold* an agency decision. See *Central S.D. Coop. Grazing Dist.* v. *Secretary of the United States Dep't of Agric.*, 266 F.3d 889, 895 n.8 (8th Cir. 2001). In the

other—which was in any event vacated by the Fifth Circuit en banc—a panel of that court determined that a district court's consideration of materials outside the agency record was consistent with *Lorion*, where the agency "had made no findings * * * despite repeated requests, and the district court was forced to do so itself." *Sierra Club* v. *Peterson*, 185 F.3d 349, 369-370 (1999), reh'g en banc granted, 204 F.3d 580, opinion vacated, 228 F.3d 559, 565 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001).

3. Respondent suggests (Br. in Opp. 15) that the petition presents only the fact-bound question of whether the administrative record in this case "did, indeed, provide a factual basis for the BIA to come to a different conclusion [about respondent's eligibility for asylum and entitlement to withholding of deportation] than the court." That is not the issue before this Court. It is immaterial for purposes of the petition whether—if the case had been remanded—the BIA would have reached the same conclusion as the court of appeals. The significant point is that the court of appeals denied the BIA the opportunity to decide an important immigration issue that is assigned to it by statute and regulation, and to update the record on conditions in Guatemala when doing so. This Court need not consider the merits of respondent's asylum application in order to correct the Ninth Circuit's error.

4. Respondent asks the Court to take "judicial notice" of a motion to reopen the BIA's proceedings that he filed in 1999, and of his ensuing petition for judicial review of the BIA's denial of that motion. Br. in Opp. 5 n.2; see Br. in Opp. App. 1a-21a. The 1999 motion to reopen cited events that occurred shortly after the 1998 evidentiary hearing in respondent's case. See Br. in Opp. App. 19a. Respondent suggests that the BIA's denial of his motion to reopen shows that the BIA would not have considered supplementing the administrative record if the Ninth Circuit had remanded this

case. See Br. in Opp. 14. But respondent's suggestion is belied by the BIA's order denying respondent's 1999 motion.

In the order denying reopening, the BIA—rather than declining to consider respondent's new evidence—determined that respondent had not met his burden of showing that "this new evidence would likely change the result of his case." Br. in Opp. App. 19a. The BIA explained that respondent's new evidence did not suggest a danger of political persecution by guerillas if respondent were returned to Guatemala, but only that respondent's family had suffered from violence in Guatemala, apparently as "a result of the general conditions of violence and civil unrest." *Id.* at 20a. The BIA therefore *did* consider petitioner's post-hearing evidence. And the BIA would be free to consider that evidence once again, along with any other evidence respondent and the INS might introduce, if the case is remanded to the BIA in accordance with established principles of judicial review of agency action. Respondent's evidence, moreover, related solely to events in Guatemala during the 1990s. It therefore could not resolve in remand proceedings the question of whether, in light of *current* conditions in Guatemala, respondent *now* has a well-founded fear of persecution (to be eligible for asylum) or *now* would face a clear probability of persecution (to be eligible for withholding of deportation) if he is returned to that country.

* * * * *

The petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *INS* v. *Chen*, petition for cert. pending, No. 02-25 (filed July 3, 2002).[4] In the alternative, the petition should be held

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[4] Respondent does not dispute the petition's demonstration (Pet. 13-14) that consolidation with *Chen* is warranted if the Court grants certiorari in this case.

pending this Court's disposition of the petition in *Chen*, and then should be disposed of as appropriate in light of the final disposition of that case.

Respectfully submitted.

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SEPTEMBER 2002